

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 126 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

AMRA SEJA, DECEASED

Versus

KORAD RAVA KALA

Appearance:

MR IS SUPEHIA for appellants
MR VC DESAI for Respondent No. 1
Respondent No. 2, 3 served

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 16/06/2000

ORAL JUDGEMENT

1. Heard learned Advocate Mr. I.S. Supehia for the
appellants and learned Advocate Mr. V.C. Desai for
respondents.

2. Brief facts of the Appeal go to show that the present appellants were the plaintiffs in Civil Suit No. 13 of 1977 filed by them in the court of Civil Judge (JD), Radhanpur, and the present respondents were defendants in the above suit. The suit was filed by the present appellants contending that there is a field bearing Survey No.1339 in village Madhuttra, which was originally owned by Seja Ranmal. Seja Ranmal died leaving two sons, named, Manda and Amra. These two brothers gave this suit land to Bai Sakhi, their mother for the maintenance during her life time, and thereafter the land was to be partitioned among two brothers - Manda and Amra. After the death of Bai Sakhi, as per the case of the plaintiffs, both the brothers i.e. Manda and Amra, jointly mortgaged this land to defendant No.1 Danger Desur Ala for Rs. 1,501 in Samvat Year 2020 for Kria Karam of Bai Sakhi and term for redemption was fixed for ten years. It was further contended in the suit that since the brother Manda was eldest in the family, the lands stood in the name of Manda in the revenue record. It is further contended that defendant No.1 Danger Desur Ala in turn sub-mortgaged suit land to defendant No.2 Korad Rava Kala. The plaintiffs are the heirs of the deceased Seja Ranmal and Amra Seja, while defendant No.3 Aher Bacha Manda, is the sole heir of deceased Manda. Elder brother Manda died by leaving only one son i.e. defendant No.3. Further, it is the case of the plaintiff that the plaintiffs requested the defendant No.3 to accompany them for the redemption of the field of the mortgage executed with defendant No.1, but since defendant No.3 did not agree, the plaintiffs redeemed the mortgage by paying Rs. 1,501/- to defendant No.1 and necessary entries to this effect was made in one khata book, which is on record at Exh.45. Therefore, after exchange of notice between the parties, the present plaintiff filed a suit for the relief of redemption of sub-mortgage i.e.between defendants No.1 and 2 and for the possession of the suit property from defendant No.2 after redemption.

3. Learned trial judge believed the story of the plaintiffs and basing his reasoning on Exh.45, a redemption note, ordered preliminary decree in favour of plaintiffs for the redemption of the mortgage entered into between defendants No. 1 and 2. Vide his order and decree, dated 29.2.1980, the learned trial judge also ordered defendant No.2 to hand over the vacant possession of suit land to the plaintiff.

4. Being aggrieved, the defendant No.2 Korad Rava

Kala, preferred Regular Civil Appeal No. 36 of 1980 in the court of District Judge, Banaskantha at Palanpur. After hearing the parties, Jt. District Judge, Banaskantha at Palanpur, vide his order dated 7.9.1983 allowed the appeal and reversed the judgment and decree passed by the trial court in Civil Suit No. 13/1977 and the suit of the plaintiff by allowing appeal stood dismissed. The Jt. District Judge, Banaskantha at Palanpur, did not believe the story of the plaintiffs regarding the redemption of the mortgage between the plaintiffs and defendant No.1 and as evidenced by Exh.45 and relied upon the statement of defendants No. 2 and 3 that the property was in fact partitioned between brothers Amra and Manda i.e. father of the defendant No.3 and the suit property came to the share of Manda, the father of the defendant No.3 and that in the capacity of the absolute owner of the suit field, Manda executed a mortgage in favour of defendant No.2 and as such the defendant No.2 is in possession of the suit property. Learned Jt.District Judge further relied upon the entries made in the revenue record right from 1964-65 to the effect that the suit property stands in the name of deceased Manda. Learned Jt. District Judge after rejecting the case of the plaintiffs and accepting the statement of defendants No. 2 and 3 as stated above, reversed the findings of the trial court and dismissed the suit.

5. Being aggrieved by the above said judgment and findings of the Joint District Judge, Banaskantha at Palanpur, in Regular Civil Appeal No. 36 of 1980, this Second Appeal has been preferred by the original plaintiffs and the respondents are the original defendants.

6. While admitting the Appeal this court formulated following 8 substantial questions of law to be answered.

1. Whether one of the coparceners of a joint

Hindu family having an undivided share in the property is entitled to exercise the right of redemption against a mortgage in possession particularly when other coparceners do not agree to exercise such a right.

2. Whether a coparcener of a joint Hindu

family having an undivided share in the property can file a suit for redemption of mortgage without first filing a suit for partition of the joint family

properties.

3. Whether a mortgage by subrogation can file a suit against a mortgagee in possession for possession.
4. Whether an adverse inference can be drawn against a mortgagee in possession who does not produce the mortgage deed in court.
5. Whether an unregistered and unstamped document exhibited by a court can be looked into for any purpose without de-exhibiting the same.
6. Whether an entry in the revenue record made behind the back of an interested person can be taken into consideration for any purpose.
7. Whether a mortgage by oral arrangement can be preferred to a mortgage by unregistered and unstamped document of mortgage.
8. Whether the judgment of the lower appellate Court, in the facts and circumstances of the case, is perverse and against the settled principles of law and requires to be set aside.

7. Having considered the rival contentions, it appears that questions No. 1, 2 and 3 is required to be decided in favour of the appellants though the appellants do not get any substantial relief thereby. Learned Jt. District Judge observed in the decision that a co-mortgagor before he resorts for the redemption of the property mortgaged, will have to resort to a partition and then he can redeem his share in the property mortgaged. It is also observed by the learned Jt. District Judge that the co-parceners of the Joint Hindu Family cannot file a suit for redemption of a mortgage without first filing a suit for partition of the joint family property. This covers the substantial issues No. 1, 2 and 3 above. So, the legal position as it stands today, as per Section 91 and 92 read with Section 60 of the Transfer of Properties Act, any coparcener having interest in the mortgaged property can redeem the property mortgaged and by principle of subrogation, the said co-mortgagor steps in the shoe of mortgagee qua his

co-sharer. In this view of the matter, while I do not agree with the learned Jt. District Judge in the above legal observation, I agree with the other reasoning of the Jt. District Judge for dismissing the suit of the plaintiffs, which substantially covers the issues of law as framed No. 4 to 8 above.

8. It is established fact that the mortgage referred to and alleged to have been executed between defendant No.1 on the one hand and deceased Amra and Manda jointly on the other hand, which is alleged to have been redeemed by Exh.45, is the mortgage for Rs. 1,501. The period of the mortgage is fixed 10 years. According to Sec. 17 of the Registration Act, any such mortgage, mortgage money of which is Rs.100/- and above requires in writing, properly stamped and registered. When a transaction is made compulsorily registered than no oral evidence, as per the legal position, be made admissible for such document. There is no documentary evidence regarding the above said mortgage, which took place between Amra and Manda on the one hand and defendant No.1 on the other hand, therefore, any oral evidence in this regard is not admissible. Inescapable conclusion therefore would be, the plaintiffs have failed to prove the case that Amra and Manda have jointly mortgaged this property to defendant No.1 and defendant No.1, in turn, sub-mortgaged this property to defendant No.2. Jt. District Judge, Banaskantha, rightly held that the trial judge erred in appreciating this position that the plaintiffs could not establish their theory of mortgaging of property to defendant No.1

9. Likewise, there is no documentary evidence between alleged transaction of sub-mortgage took place between defendants No. 1 and 2, which also allegedly is of Rs. 1,501/- and require compulsory registration. In these circumstances, learned District Judge relied upon the statements made by defendants No. 2 and 3 against their interest that the partition, in fact, took place between two brothers - Amra and Manda and the suit property came to the share of deceased Manda and during his life time the suit property was mortgaged by Manda to defendant No.2, and as such, defendant No.2 was having the possession of suit property. Learned District Judge also relied upon an entry No. 482, which was made in the revenue record from 1964 onwards in the name of the deceased Manda.

10. In these circumstances, when the plaintiff have failed to establish their case regarding two mortgage transactions pleaded, a decree of redemption of the

mortgage allegedly executed between defendants No. 1 and 2 and the possession in consequence thereof must be denied and Jt. District Judge, Banaskantha, rightly reversed the finding of the trial court.

11. Except as said above, regarding substantial question Nos. 1, 2 and 3, I agree with the reasoning of the learned Jt. District Judge, Banaskantha, allowing the Appeal and I see no reason for interfering in the judgment and order of the first appellate court.

12. In this view of the matter, this Second Appeal fails and the same is dismissed with no order as to cost.

(J.R. Vora, J.)

p.n.nair
